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No. 01-1187

IN THE

Supreme Court of the United States

NORCAL WASTE SYSTEMS, INC. and NORCAL WASTE SYSTEMS, INC. EMPLOYEE STOCK OWNERSHIP PLAN AND TRUST,

Petitioners,

v.

JULIO ABRAHAM, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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STATEMENT PURSUANT TO RULE 29.6

The corporate disclosure statement of Petitioner Norcal Waste Systems, Inc. was set forth at page *ii* of its Petition for a Writ of Certiorari, and there are no amendments to that statement.

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INTRODUCTION

The Petition demonstrated that the Ninth Circuit has created a critical circuit split on the issue of ERISA "conflict preemption" — a split that renders unclear the duties and potential liability of thousands of ERISA fiduciaries for acts of managing plan assets. In their opposition, Respondents mischaracterize Petitioners' argument and the opinion below and attempt to distinguish the conflicting opinions of five Circuits on irrelevant grounds.

Respondents do not dispute that there *would* be a circuit split meriting this Court's review if the Ninth Circuit *did* rule, as Petitioners contend, that a state law fiduciary breach claim can be based on fiduciary acts regulated by ERISA and yet escape "conflict preemption." Rather, Respondents attempt to show that the Ninth Circuit did not so hold. The attempt fails. The Ninth Circuit's published decision identified the claims at issue as based, at least in part, on decisions about investing plan assets made by the ESOP fiduciaries in a series of ESOP transactions — acts squarely regulated by ERISA. Pet. App. ("App.") 6a ("The alleged conduct underlying Plaintiffs' claims was a series of breaches, misrepresentations, omissions, concealment[s], and conflicts of interest by Defendants . . . in conjunction with the initial leveraged buyout, *the 1987 Envirocal transaction, and subsequent ESOP activities*" (emphasis added)).

The Ninth Circuit treated the underlying conduct as legally irrelevant because it found dispositive the fact that the ESOP Participants had not brought suit in their "capacity" or "status" as ESOP Participants (and the ESOP fiduciaries thus had not been sued in their ERISA capacity). This "dual capacity" analysis squarely conflicts with decisions in five other Circuits because it ignores a basic principle of ERISA fiduciary law articulated by this Court: while a party can function as an ERISA fiduciary in some acts and as a non-fiduciary in others, *each single act* is subject either to ERISA or to state law, not both. *See* Part B, *infra*.

Respondents also contend that the Ninth Circuit's "displacement" holding affords an independent basis to affirm the judgment even if its "conflict preemption" holding is reversed, and that Petitioners somehow overlooked or waived this issue. Opp. 14–18. This is incorrect. If the ESOP Participants' state law fiduciary breach claim against various ESOP fiduciaries does "relate to" an ERISA plan (the ESOP), then that claim *of necessity* falls within the scope of ERISA's civil enforcement provisions and is "displaced." *See* Part A, *infra*. The Petition made this point in a footnote because no more elaborate discussion was necessary.

In sum, the Ninth Circuit's "conflict preemption" holding conflicts with the law in five other Circuits. A reversal of that holding will lead inexorably to a reversal of the judgment. ERISA fiduciaries, when investing plan assets, should not be required to consider *both* their fiduciary duties under ERISA *and* their potentially conflicting fiduciary duties under state law. Respondents do not and cannot contest the critical importance of this issue to the nation's thousands of ERISA fiduciaries. *See* Part C, *infra*.

ARGUMENTS IN REPLY

A. Because The Plan Participants' Claims Against The Plan Fiduciaries Relate To The Plan (And Thus Are "Conflict Preempted"), Those Claims Necessarily Fall Within ERISA's Civil-Enforcement Scheme And Are "Displaced."

The Ninth Circuit's primary holding was that the ESOP Participants' claim was not subject to "conflict preemption" because the Participants sued in their capacity as noteholders, not plan participants (and because the ESOP fiduciaries thus were not sued in their capacity as ERISA fiduciaries). App. 11a–17a. Respondents' main argument in opposition addresses a different issue. Respondents contend that the Ninth Circuit's assertedly distinct "displacement" holding — that the ESOP Participants' breach of fiduciary duty claim did not fall

within ERISA's civil enforcement provisions — does not conflict with the law in any other Circuit, and that *this* lack of conflict precludes a grant of *certiorari*. Opp. 14–18.

Respondents are mistaken. To justify a grant of *certiorari*, Petitioners need not show that the Ninth Circuit's "displacement" holding creates a circuit split. Petitioners need only show that: (1) the "conflict preemption" holding creates a circuit split (as it does); and that (2) if this Court reverses that holding, the "displacement" holding will not afford an independent basis to affirm the judgment. As the Petition showed, the "displacement" and "conflict preemption" holdings rely on precisely the same reasoning. *See* Pet. 14 n.5. If one is reversed, the other will necessarily fall with it, dictating reversal of the judgment. Accordingly, nothing bars this Court's review of the circuit split created by the "conflict preemption" holding.

ERISA completely preempts a claim pled under state law if a court can recharacterize the claim as actually arising under the civil-enforcement provisions of ERISA Section 502(a). *See Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 62–64 (1987). This requires that the claim be of a sort authorized by Section 502(a) and be asserted by a plaintiff with standing to sue, against a defendant subject to suit, under that Section. *See id.* at 62–63 (identifying plaintiff, claim, and defendant). The Ninth Circuit has separated out a part of that analysis — the inquiry whether the claim "relates to" an ERISA plan (and thus would be preempted by Section 514(a)) — and made it a preliminary inquiry labeled "conflict preemption." *See* App. 9a. It treats the remaining requirements for complete preemption as a second inquiry labeled "displacement." *Id.*[1]

1. The Ninth Circuit's division of the analysis into two steps is a minority approach. Most Circuits recognize that complete preemption involves but one inquiry, *i.e.*, whether a claim pled under state law can be recharacterized as arising under ERISA Section 502(a). *See, e.g.*, *Danca v. Private Health Care Sys., Inc.*, 185 F.3d 1, 5 (1st Cir. 1999)

(Cont'd)

Within that framework, because the ESOP Participants' claims here "relate to" the ESOP, the remaining "displacement" inquiry is readily satisfied. Section 502(a)(3) authorizes plan participants to bring suit to recover individual equitable relief "to redress . . . violations" of "any provisions of [ERISA]" (29 U.S.C. § 1132(a)(3)), such as the provision imposing fiduciary duties on ERISA plan fiduciaries like the ESOP fiduciaries here. *See* 29 U.S.C. § 1104(a)(1)(B). As plan fiduciaries, the ESOP Committee members are proper defendants to such a claim; as participants, the ESOP Participants are proper plaintiffs. The Ninth Circuit acknowledged this. *See* App. 18a (proper plaintiffs), 19a (proper defendants).[2]

(Cont'd)

(citing opinions from four Circuits); *Jass v. Prudential Health Care Plan, Inc.*, 88 F.3d 1482, 1486–87 (7th Cir. 1996). In those Circuits, the Ninth Circuit's analysis of whether the claims "relate to" an ERISA plan (its "conflict preemption" analysis) would be part of the complete preemption analysis under Section 502(a); if the claims did not "relate to" a plan, they could not possibly fall within the scope of Section 502(a). *Cf. Rice v. Panchal*, 65 F.3d 637, 646 n.10 (7th Cir. 1995) ("Where a claim is completely preempted under §502(a) it is necessarily preempted under §514(a)."). Thus, within the analytic framework of most Circuits, the conflict shown in the Petition *is* a conflict about "complete preemption."

2. In contrast, the claims of the non–ESOP Participant plaintiffs are an example of claims that are preempted by ERISA but not *completely* preempted, because they are not brought by plaintiffs with standing to sue under ERISA — *i.e.*, participants, beneficiaries or fiduciaries. Respondents complain, in a footnote, that Petitioners "fail to explain how some note holders' claims [those of the non–ESOP Participant plaintiffs] were indisputably not displaced while the exact same claims of other note holders [the ESOP Participant plaintiffs] were." Opp. 13 n.2. But the same footnote flags the explanation. Claims can be recharacterized under Section 502(a) only if ERISA gives the plaintiff standing to sue (*see* p.3 *supra*), and the non–ESOP Participant plaintiffs, as Respondents note, "had no standing under ERISA and could not possibly bring a claim within the scope of [its] civil enforcement provisions." Opp. 13 n.2. The ESOP Participants could (and did).

The Ninth Circuit offered only one conclusory reason why, in its view, the ESOP Participants' claims did not arise under Section 502(a)(3)[3]: "none of these Plaintiffs seek[s] relief *as a participant*, beneficiary, or fiduciary to enjoin any act or obtain any other equitable relief to redress any violations or enforce any provisions of ERISA. . . . Simply put, the claims do not concern any plan fiduciaries *in their capacity* as such." App. 19a (quotation omitted, emphasis added) (paraphrasing ERISA § 502(a)(3)). But these statements, which are based on the *capacity* in which the ESOP Participants assertedly had sued (and the ESOP fiduciaries had been sued), do no more than reiterate the Ninth Circuit's analysis of why the claims did not "relate to" the ESOP and thus were not subject to "*conflict preemption*" — the *first* prong of the Ninth Circuit's "complete preemption" analysis.[4] *See, e.g.*, App. 16a ("Although some Plaintiffs were also ESOP Participants . . . , their claims were brought solely in their capacity as former shareholders and current creditors"). The Ninth Circuit gave no independent reason for its "no displacement" holding. *See* App. 12a–17a. If the court's "dual capacity" analysis is incorrect (and it is; *see* Part B, *infra*), the "displacement" analysis falls with it.

Accordingly, if this Court agrees that the Ninth Circuit's holding on "conflict preemption" conflicts with the law in other

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3. The Ninth Circuit also stated that it could not recharacterize the ESOP Participants' claims under *subdivision (2)* of Section 502(a) because the claims sought relief on behalf of the ESOP Participants individually, not the plan. App. 19a. Even were that analysis correct (*but see* Pet. 15 n.5), that defect would not prevent the court from recharacterizing the claims under *subdivision (3)*. *See Varity Corp. v. Howe*, 516 U.S. 489, 507–15 (1996) (Section 502(a)(3) authorizes equitable relief on behalf of individual participants as well as on behalf of plan).

4. While the paraphrased passage from Section 502(a)(3) also refers to the type of relief sought, the Ninth Circuit never suggested that the ESOP Participants' claim escaped complete preemption because it sought the wrong type of relief. (Nor would such a defect allow a plaintiff to avoid complete preemption. *See* Pet. 15 n.5 and authorities cited there.)

Circuits, that conflict warrants review. There is no possibility that, should this Court review and reverse that holding, some independent obstacle to recharacterizing the ESOP Participants' claims under Section 502(a)(3) would provide an independent ground to affirm the judgment below.

B. The Ninth Circuit's "Conflict Preemption" Holding Conflicts With The Law In Five Other Circuits, And Respondents Cannot Explain Away That Conflict.

As the Petition demonstrated, the Ninth Circuit's "conflict preemption" analysis conflicts with the law in five other Circuits because it violates the basic principle, explained in *Pegram v. Herdrich*, 530 U.S. 211 (2000), that while a party may perform some acts in an ERISA fiduciary capacity and others in a non-ERISA capacity, each single act is governed either by ERISA or by state law, not both. Respondents attempt to avoid this fact in two ways: (1) by mischaracterizing the opinion below in an attempt to bring it into compliance with that principle; and (2) by trying to distinguish the conflicting opinions of other Circuits on irrelevant grounds.

1. As The Opinion Below Makes Clear, The Conduct On Which Plaintiffs Based Their Claim That The ESOP Fiduciaries Breached State Law Fiduciary Duties Consisted Largely Of ERISA-Regulated Fiduciary Acts.

In contending that the Ninth Circuit's analysis does not conflict with other Circuits' holdings, Respondents say that "the [ESOP Participants' state law] claims do not arise from the same acts *that would give rise to liability under ERISA*." Opp. 16 (emphasis added). Respondents' contention that the ESOP fiduciaries were not exposed to liability under both ERISA and state fiduciary law is odd; after all, the Respondents sued the same ESOP fiduciaries *under ERISA* for the same acts. *See* App. 6a. Respondents miss the point, which is that the Ninth Circuit has now allowed plan participants to sue ERISA fiduciaries for breach of fiduciary duties under state law with respect to *acts indisputably regulated by ERISA*.

The Ninth Circuit correctly characterized the factual predicate of Respondents' state law claims:

> The alleged conduct underlying Plaintiffs' claims was a series of breaches, misrepresentations, omissions, concealment, and conflicts of interest by Defendants . . . in conjunction with the initial leveraged buy out, *the 1987 Envirocal transaction, and subsequent ESOP activities.*" (*Id.* (emphasis added))

In "the 1987 Envirocal transaction and subsequent ESOP activities," the members of the ESOP Committee made decisions to cause the ESOP to merge with other ESOPs — transactions materially affecting the value of the ESOP's sole asset, its Norcal stock. *See* Pet. 3-4, 8-9. These decisions are paradigmatic examples of ERISA fiduciary conduct in investing and managing plan assets. *See id.* 3-4, 8-9, 15-16. In fact, the Ninth Circuit identified the *identical* conduct as subject to "duties imposed by ERISA" when it described the separate action brought by the ESOP Participants against the ESOP fiduciaries under ERISA as one "for the breach of their duties imposed by ERISA in conjunction with *the 1987 Envirocal transaction and subsequent ESOP activities*." App. 6a (emphasis added).[5]

5. The passages in the opinion on which Respondents rely *do not* establish, as Respondents imply, that the state law fiduciary breach claim was based exclusively on some other conduct not regulated by ERISA. The first passage they quote says *nothing* about what conduct was at issue and simply reiterates the court's "dual capacity" analysis:

> The claims . . . arise from [Plaintiffs'] *status* as note holders, and do not "touch on" the *status* of the ESOP as a benefit plan or of any of Plaintiffs as participants in the plan (or on any claim the participants may make against the plan *in that capacity*). (App. 14a (quoted at Opp. 17) (emphases added))

Equally unavailing is Respondents' reliance on the second quoted passage: "[t]he conduct at issue concerned the acquisition of Norcal

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Thus, using its "dual capacity" analysis, the Ninth Circuit allowed the ESOP Participants to sue the ESOP fiduciaries under state fiduciary law for conduct regulated by ERISA: "the 1987 Envirocal transaction and subsequent ESOP activities." That analysis is what created the Circuit conflict.[6]

2. Respondents' Efforts To Distinguish The Other Circuits' Opinions Mischaracterize Both Those Opinions And The Petition's Argument.

Respondents try to distinguish the conflicting opinions of other Circuits by arguing that, unlike here, the conduct at issue in those cases concerned benefits or the administration of benefit plans.[7] Respondents apparently believe that such benefits claims are distinguishable for preemption purposes from claims for breach of fiduciary duty relating to an ERISA plan, as here. But a state law fiduciary breach claim relating to an ERISA plan is

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shares in exchange for restricted notes and a subsequent failure to redeem those notes." App. 16a (quoted at Opp. 17). This passage does not exhaust the opinion's catalog of the conduct at issue, as shown by the court's fuller description of "[t]he alleged conduct underlying Plaintiffs' claims" (App. 6a) quoted above.

6. Respondents' implication that this Court in *Pegram* endorsed such an analysis is mistaken. *See* Opp. 16 (accusing Petitioners of "arguing that the Court of Appeals' 'dual capacity' analysis is flawed, while conceding elsewhere that this Court has recognized the very same rule, *i.e.*, 'not all acts of a fiduciary who is for some purposes an ERISA fiduciary are fiduciary acts regulated by ERISA'") (quoting Pet. 13 (citing *Pegram*, 530 U.S. at 225)). The Ninth Circuit did not identify *separate* acts, some regulated by ERISA and some not, as *Pegram* recognized. Rather, it allowed the *same ERISA fiduciary acts* to be subject both to ERISA and to state fiduciary law.

7. *See, e.g.*, Opp. 17 (quoting App. 17a); *id.* 20 (discussing *Smith v. Provident Bank, Inc.*, 170 F.3d 609 (6th Cir. 1999)); *id.* 22–23 (discussing Second, Seventh and Eighth Circuit opinions).

no less preempted than a benefits claim; benefit claims are just more common.[8]

Respondents also incorrectly contend that Petitioners espouse, as the proper rule of law, what is actually the Petition's description of the complete preemption rule in the Sixth Circuit: "'[W]hen ERISA regulates a plan, it occupies the field of duties of care regarding the plan — fiduciary or other — and leaves no room for state law duties between the parties thereto'" Opp. 20 (quoting Pet. 20)). Respondents contend that this rule conflicts with *Pegram* and would "make ERISA the source of law for all possible claims between ESOP participants and their employer." *Id.*

But the quoted passage from the Petition simply described the Sixth Circuit's holding in *Smith v. Provident Bank*, not Petitioners' position. The Petition argues that ERISA is the source of law for claims between participants and ERISA fiduciaries (including employers) *only if* the claims concern *acts* regulated by ERISA. *See* Pet. 13–14.

Significantly, if Respondents are correct that *Smith expands* the scope of ERISA complete preemption beyond that dictated by this Court's precedents, then it all the more conflicts with the Ninth Circuit's holding in this case, which impermissibly *contracts* that scope. Respondents' argument thus only further demonstrates the extent of the circuit split.

C. Respondents Concede That The Issue Presented Is Of Nationwide Importance, Warranting This Court's Review.

Respondents have no answer to — and thus concede — Petitioners' demonstration of the broad scope and serious consequences of the Ninth Circuit's opinion: thousands of

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8. Phrased differently, if a state law claim for breach of fiduciary duty can be recharacterized as one for breach of ERISA fiduciary duty under Sections 502(a)(2) or (3), then it is no less subject to complete preemption than a state law claim that can be recharacterized as one for benefits under Section 502(a)(1).

ERISA fiduciaries face a severe dilemma if their acts in managing plan assets are subject to fiduciary duties under both ERISA and state law. Pet. 2–5, 25–26. The Ninth Circuit here allowed the ESOP Participants to proceed with claims premised on a state law fiduciary duty requiring the ESOP fiduciaries to *reject*, as harmful to the ESOP note holders, transactions that they believed their fiduciary duties under ERISA required them to *accept*, as in the interests of (all) ESOP participants. *Id.* 4. In no other Circuit (save the Fifth) could groups with divergent interests *vis-à-vis* an ERISA plan put the plan's fiduciaries in such an untenable position. The effect of this circuit split on the fiduciaries who manage the nation's more than 700,000 private pension plans justifies review by this Court.

CONCLUSION

For the foregoing reasons, the Petition for a writ of certiorari should be granted.

Respectfully,

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